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HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 578

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; and MISSOURI-ILLINOIS RAILROAD COMPANY, a Corporation,
Petitioners,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioners, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on December 23, 1954.

OPINIONS BELOW.

The opinion of the District Court (R. 152-154) is reported in 117 F. Supp. 57. The opinion of the Court of Appeals, printed in Appendix B hereto, is reported in ..... F. 2d .....

JURISDICTION.

The judgment of the Court of Appeals was entered on December 23, 1954. No petition for rehearing was filed. Mandate of the Court of Appeals was, upon motion of appellants, stayed for a period of 30 days after January 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED.

1. Absent diversity of citizenship of the parties, does a dispute between rail carriers concerning solely the interpretation of the break point provision of a revenue divisional agreement covering interstate traffic, which agreement was entered into voluntarily, and not pursuant to an order of the Interstate Commerce Commission, present a federal question?

2. If jurisdiction of the federal court is conferred by the Interstate Commerce Act, 49 U. S. C. A., Sec. 1 et seq., does Section 16 (3) (a) and (e) thereof, which fixes the time beyond which no court could have jurisdiction, apply in a suit arising from a dispute between carriers respecting division of revenues?

3. If said dispute presents a federal question and the courts have not been deprived of jurisdiction, does a proper interpretation of Item 66-B, paragraph (b) of said

agreement require the primary break of said divisions to be made on the St. Louis, Mo.-East St. Louis, Ill., gateway, or on the Flinton, Ill., gateway?

STATUTES INVOLVED.

The statutory provisions involved are Sections 1 (4), 6 (1), 8, 9, 16 (3) (a) and (e) of the Interstate Commerce Act, 49 U. S. C. A., Sections 1 (4), 6 (1), 8, 9, 16 (3) (a) and (e); and are printed in Appendix A hereto.

STATEMENT.

St. Louis-San Francisco Railway Company filed a complaint against Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, in the District Court of the United States for the Eastern District of Missouri on January 29, 1952, to recover $361,078.05 together with interest at 6% per annum from August 25, 1947, which it claimed as an additional amount due it as its division of the joint revenue collected on 7,131 tank carloads of crude oil shipped from Greig, Oklahoma, to Selmaville, Illinois, during the period June 1, 1944, to October 31, 1945 (R. 1-5). The suit arose out of a dispute between the parties over the interpretation and application of their divisional agreement. There is no diversity of citizenship of the parties (R. 2). Plaintiff, Frisco, by amendment to its complaint alleges that its action arises under the Interstate Commerce Act, 49 U. S. C. A., Section 1 et seq. (R. 17), and which the defendants in their answer thereto denied (R. 18).

All the essential facts are covered by stipulations of the parties, except the interpretation of Item 66-B of Supplement 52 to Southwestern Lines' Division Sheet No. 100, which presents the controlling issue insofar as the merits of the cases are concerned (R. 63, 71-87, 120, 121, 134-141). The other questions pertain solely to the jurisdiction of the federal courts.

The majority of the court below affirmed the District Court's interpretation of Item 66-B, holding that St. Louis, Mo.-East St. Louis, Ill., and not Flinton, Ill., is the inter-territorial divisional gateway on the traffic involved by concluding ". . . that each of the [District Court's] findings, 15, 16 and 17, is supported by substantial evidence and none is clearly erroneous" (App. B., p. 8).

Judge Sanborn, dissenting, said: "I am, however, of the opinion that there was an inadequate basis for determining that the Missouri-Illinois Railroad Company's division of the joint revenue on the traffic in suit was unlawful. The judgment appealed from should, I think for that reason only, be reversed" (App. B., p. 16).

The court below unanimously affirms the holding of the trial court that "jurisdiction of this court is conferred by the Interstate Commerce Act, 49 U. S. C. A., Section 1, et seq" (R. 159; App. B., p. 9), but seemingly are not in entire agreement with respect to the interpretation and application of Section 16 (3) (a) and (e) of the Interstate Commerce Act, 49 U. S. C. A., Section 16 (3) (a) and (e) (App. B., p. 14), which read:

> 16 (3) (a) "All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after."
>
> 16 (3) (e) "The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."

Petitioners contended that the lapse of time before the commencement of the action not only barred the remedy, but extinguished the right, and therefore went to the jurisdiction of the courts. Their reliance is upon **Midstate**

Horticultural Co. v. Pennsylvania Railroad Company (1943), 320 U. S. 356, 364.

The court below relies upon **Atlantic Coast L. R. Co. v. Baltimore & Ohio R. Co.** (1935, D. C. Md.), 12 F. Supp. 711, by stating (App. B., p. 13):

> "But the precise question was considered by the court in **Atlantic Coast L. R. Co. v. Baltimore & Ohio R. Co.**, 12 F. Supp. 711 (loc. cit. 718-719), and we are in accord with the court's declaration in that case that 'these provisions [49 U. S. C. A., section 16 (3) (a-c)[1]] seem to contemplate actions or complaints between carriers and shippers, and not between carriers only. (a) and (c)[1] also seem clearly inapplicable because the complaint here is not for the recovery of "charges" or "overcharges."' That decision appears to have been accepted by the railroads since its promulgation in 1935 without any protest that we know of by the Interstate Commerce Commission which is primarily charged with the railroad regulation involved in divisions from interterritorial hauls. And we adhere to it."

Judge Johnsen went along with the court's opinion relative to the construction made of 49 U. S. C. A., Section 16 (3) (a) and (e) for the sake of unanimity, but stated in his concurring opinion (App. B., p. 14):

> "The only portion of the opinion that has bothered me somewhat is the construction made of 49 U. S. C. A., § 16 (3) (a) and (c),[1] through the adoption of Judge Chestnut's language in **Atlantic Coast Line R. Co. v. Baltimore & O. R. Co.**, D. C. Md., 12 F. Supp. 711, 718, that 'These provisions seem to contemplate actions or complaints between carriers and shippers, and not

[1] Section 16 (3) (e) is erroneously referred to as Section 16 (3) (c) throughout Court of Appeals opinion.

between carriers only.' I can see no reason on the statute to believe that, when Congress deemed it advisable, in the interest of uniformity and certainty, to impose a limitation on 'All actions at law by carriers . . . for recovery of their charges, or any part thereof,' it was in any way concerned about or intending to have regard for any theories, forms, technicalities and distinctions in common law actions or recoveries. I think it was fixing a time, as a general transportation-code policy, within which a carrier had to act to recover its transportation charges or revenues against anyone who owed it the duty of making payment thereof as such. And certainly what is here being recovered is in fact transportation charges or revenues.

"Both of my colleagues, however, feel that Judge Chestnut's construction of the statute has probably had such acceptance and reliance in the railroad world as to be entitled to stand on the basis of stare decisis. I am without any enlightment or data in the situation on this score, either from the briefs or otherwise, but I shall, for the sake of unanimity, go along and accept my colleagues' respected view on the point."

Do the provisions of 49 U. S. C. A., Section 16 (3) (a) and (e) contemplate actions between carriers as well as between carriers and shippers? The Court of Appeals adheres to a district court opinion holding that "these provisions . . . **seem** to contemplate actions or complaints between carriers and shippers, and not between carriers only . . .," (emphasis supplied) but with some misgiving on the part of one member. Can jurisdiction be conferred upon the federal courts by the asserted railroads' acceptance of and the Interstate Commerce Commission's failure to protest a federal district court's opinion of doubtful import?

REASONS FOR GRANTING THE WRIT.

1. No Federal Question Is Presented.

All the essential facts except the interpretation of Item 66-B of Supplement 52 to Southwestern Lines' Division Sheet 100 are covered by stipulations between the parties (R. 71-87, 120, 121, 134-141). It is stipulated that there is no diversity of citizenship between the parties (R. 79); nor is there any question pertaining to facilities, services, routes, rates or reasonable divisions (R. 79-86). The divisional arrangement is by voluntary agreement of the parties and not under the compulsion of any order by the Interstate Commerce Commission (R. 81-84, 123, 124). The crux of this complaint is the interpretation of a provision of such voluntary agreement, namely, Item 66-B of Supplement 52 to Southwestern Lines' Division Sheet 100 (R. 124-127, 129, 130). That item embodies the conditions under which the Missouri-Illinois Railroad Company was willing to become a party to Southwestern Lines' Division Sheet 100, and upon which conditions it did, by agreement of the parties thereto, become a party to said division sheet (R. 130, 144, 145). Item 66-B, Paragraphs (b) (2) and (b) (3) are admitted by the respondent to be exceptions to the general principles of the division sheet and the item has "Special application to and from points on the Missouri-Illinois Railroad" (R. 125-127).

The Interstate Commerce Commission holds that the existence or nonexistence of divisions is not a tariff matter. **Acme Mills v. Director General,** as agent (1923), 81 I. C. C. 492, 494; **Chase & Co. v. N. Y. Central R. Co.** (1930), 161 I. C. C. 614, 616. "A division sheet is a publication in the form of a tariff which is circulated among connecting carriers to guide their auditors in the distribution of revenues arising from interline traffic. Generally speaking,

division sheets are not on public file. **Cornell Law Quarterly** (Vol. 39, N. 2, p. 213). The construction of an interstate tariff is not therefore involved and no federal question is presented on that ground. **Great Northern Ry. Co. v. Merchants Elevator Co.** (1922), 259 U. S. 286, 290. Nor is the fact that the carrier is under the Interstate Commerce Act sufficient, in and of itself, to confer jurisdiction. **Kansas City, Kan., et al. v. Atchison, T. & S. F. Ry. Co.** (1951), 101 F. Supp. 1, 5. In fact, respondent's contentions clearly and bluntly establish that the real basis of its suit is a breach of contract.

The parties to this suit have voluntarily agreed upon divisions of the joint revenue involved (R. 81-84, 143). The only question on the merits is whether the divisions break primarily over the St. Louis, Mo.-East St. Louis, Ill., gateway, or over the Flinton, Ill., gateway. That involves the construction only of Item 66-B, paragraph (b), supra (R. 129). The construction of Item 66-B, paragraph (b), supra, does not require or involve the construction of any federal law. There is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under federal law. Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. **California Oil & Gas etc. Co. v. Miller** (1899), 96 Fed. 12; **McGoon v. Northern Pac. Ry.** (1913), 204 Fed. 998, 1005; **Shulthis v. McDougal** (1912), 225 U. S. 561, 569; **Gully v. First Nat'l Bank** (1936), 299 U. S. 109, 112-114; **Consolidated Freightways, Inc., v. United Truck Lines, Inc.** (1954), 216 F. (2d) 543.

2. If the Action Arises Under the Interstate Commerce Act, 49 U. S. C. A., Section 1 et seq., the Remedy Is Barred and the Right Extinguished.

The Court of Appeals construes Section 1 (4) of the Interstate Commerce Act (App. B, p. 9), which requires common carriers by railroad to establish through routes, and in case of joint rates, fares, or charges, to establish just, reasonable and equitable divisions thereof, to embrace, with respect to "divisions," the maintenance thereof; whereas, with respect to "rates, fares, or charges," the maintenance thereof is covered by a separate section, i. e., Section 6 (1), 49 U. S. C. A., Section 6 (1) (App. A, p. 1). Thus it appears that the Court of Appeals has placed an interpretation upon Section 1 (4) which is broader than Congress intended. This construction, however, supports the contention of respondent that the federal courts have jurisdiction to determine if the carriers have maintained their voluntary agreement. It is on that theory that the Court of Appeals concludes the cause of action arises under the Interstate Commerce Act (App. B, pp. 9, 10). It cites **Alton Railroad Co. v. United States** (1932), 287 U. S. 229, as authority, but which, when scrutinized, is no such authority. The suit in that case was filed under the Urgent Deficiencies Act of October 22, 1913, Chap. 32, 38 Stat. 208, 220, to enjoin part of an order of the Interstate Commerce Commission.

The Court of Appeals having thus concluded that the cause of action herein arises under the Interstate Commerce Act by broadening the provisions of Section 1 (4) to require common carriers by railroad to **maintain** as well as **establish** divisions, it narrows the application of Section 16 (3) (a) and (e) of the Interstate Commerce Act to make it nonapplicable to the instant case by following the court's declaration in **Atlantic Coast L. R. Co. v. Baltimore & Ohio R. Co.** (1935), 12 F. Supp. 711, 718-719, that

"these provisions [49 U. S. C. A., Section 16 (3) (a-c)[1]] seem to contemplate actions or complaints between carriers and shippers, and not between carriers only" (App. B, p. 13). The federal court, in that case, had jurisdiction on the ground of diversity and its construction of Section 16 (3) (a) and (e) was from the limitation standpoint only. Here, the question involved is one of jurisdiction and not of limitation. The Court of Appeals in that connection further states: "That decision appears to have been accepted by the railroads since its promulgation in 1935 without any protest that we know of by the Interstate Commerce Commission which is primarily charged with the railroad regulation involved in divisions from interterritorial hauls. And we adhere to it" (App. B, p. 13). The Court of Appeals seems to hold therefore that jurisdiction may be conferred upon the federal courts by the asserted railroads' acceptance and the Interstate Commerce Commission's failure to protest a district court decision in which the question of jurisdiction was not even an issue.

The test of whether this action arises under the Interstate Commerce Act as alleged is whether it is subject to Section 16 (3) (a) and (e). This court held in **Midstate Horticultural Co. v. Pennsylvania R. Co.** (1943), 320 U. S. 356, 361, that Section 16 is an integral part of the Interstate Commerce Act and the comprehensive scheme of regulation it imposes. It also held (l. c. 357-360) that the expiration of the time limit fixed by Section 16 (3) (a) of the Act for the bringing of actions by carriers for the recovery of their charges **does not merely bar the remedy but extinguishes the right.** It is jurisdictional. The shipments involved herein moved during the period June 1, 1944, to October 31, 1945 (R. 80). Suit was filed by the Frisco January 29, 1952 (R. 1).

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[1] Section 16 (3) (e) is erroneously referred to as Section 16 (3) (c) throughout Court of Appeals opinion.

The Court of Appeals' treatment of "exceptions" is both unique and inconsistent. In interpreting Item 66-B, paragraph (b) (2) of Supplement 52 to Southwestern Lines' Division Sheet 100, which is an admitted exception to the general provisions of the division sheet (R. 125-127), it reads it out of the agreement and therefore devitalizes it, but in interpreting Section 16 (3) (a) which contains no exception, it reads one into the section by holding in effect that "**All** actions at law by carriers . . ." does not contemplate actions between carriers (App. B, pp. 12, 13). (Emphasis added.)

We know of no case involving a dispute between carriers over their divisions where the federal courts, in the absence of diversity or an order by the Interstate Commerce Commission, have assumed jurisdiction. The Court of Appeals has decided this question relying upon a district court decision in 1935 which is of extremely doubtful authority with respect to jurisdiction. This presents an important federal question which has not heretofore been passed upon by this court, but should be settled by it.

3. Primary Divisions Break Over the Flinton, Illinois, Gateway.

It is admitted that Item 66-B of Supplement 52 to Southwestern Lines Division Sheet 100 is an **exception** to the general provisions of said division sheet (R. 125-127). Item 66-B embodies the conditions under which the Missouri-Illinois was willing, at the invitations of carriers already a party to Southwestern Lines' Division Sheet 100, to become a party thereto. The majority of the Court of Appeals construes Item 66-B to be meaningless—negativing the admission by respondent that the item is an exception to the general provisions of the division sheet—and the effect of which would be no different than if the Missouri-Illinois had become a party to the division sheet

subject to no conditions whatever (R. 151). Judge Sanborn, in dissenting, said:

> "It seems to me that the record shows that the Missouri-Illinois Railroad Company became a party to the Division Sheet in suit upon the understanding, adequately expressed, that revenues derived from traffic from the Southwest destined for points on its line and received at either Kellogg or Flinton should be divided 22% to it and 78% to the carrier or carriers which transported the shipments to either of those gateways . . ." (App. B., p. 15).
>
> ". . . I am, . . ., of the opinion that there was an inadequate basis for determining that the Missouri-Illinois Railroad Company's division of the joint revenue on the traffic in suit was unlawful. The judgment appealed from should, I think for that reason only, be reversed" (App. B., p. 16).

Southwestern Lines' Division Sheet 100 was originally issued effective December 1, 1929 (R. 21). The Missouri-Illinois was invited to become and did become a party thereto effective with October, 1942, Accounts (R. 31, 33). Prior to the Missouri-Illinois becoming a party to said division sheet, the gateways named therein and over which the divisions broke were: Kansas City and St. Louis, Missouri, and East St. Louis, Cairo, Gale and Thebes, Illinois (R. 21, 76, 83). The Missouri-Illinois does not serve any of those gateways. So, upon becoming a party to the division sheet, Kellogg and Flinton, Illinois, the only two gateways served by the Missouri-Illinois Railroad were added as gateways (R. 31, 76, 83). The traffic in question moved from Greig, Oklahoma, a point in the Southwest, to Selmaville, Illinois, a point in Illinois on the Missouri-Illinois Railroad (R. 72, 141). It was routed via the Frisco from Greig, Oklahoma, to St. Louis, Missouri, thence via the Missouri Pacific to Flinton, Illinois, thence via the Missouri-Illinois to Selmaville, Illinois, and so moved (R. 121).

The title page of Supplement 52 to Southwestern Lines' Division Sheet 100 shows percentages accruing to and from Flinton and Kellogg, Illinois, "as provided in Items Nos. 18, 66 and 67 series" (R. 61).

Item 18 series provides for divisions between stations in Western Trunk Line-Illinois Freight Association territory and stations in Southwestern territory where the Missouri-Illinois participates as an **intermediate carrier** (R. 67, 143-147).

Item 66 series provides for divisions between (a) Missouri-Illinois stations in Missouri and Illinois Freight Association-Western Trunk Line territory; and (b) Missouri-Illinois stations in Illinois and the Southwest (R. 69, 144-147).

Item 67 series provides for divisions to and from points on St. Francois County Railroad Company which connects with the Missouri-Illinois at DeLassus, Mo. (R. 69, 145-147).

Each of those item series, Nos. 18, 66 and 67, contains a provision stating "Percentages via Kellogg, Ill., will also apply via Flinton, Ill." or "Factors to and from Kellogg, Ill., will also apply to and from Flinton, Ill." [See note, Item 18-G, R. 67, and Item 66-C, paragraph (a) (2) and paragraph (b) (2); and Item 67-A, paragraph (3), R. 69.]

Item 18 series also carries a specific "exception" as follows:

> "On traffic interchanged at E. St. Louis, Ill., or St. Louis, Mo., the divisions shown in Division Sheet, as amended, via those gateways will apply" (R. 67).

Item 67 series, paragraph (2), carries a similar specific exception as follows:

"Divisions via Kellogg, Ill., will not apply on traffic interchanged at East St. Louis, Ill., or St. Louis, Mo." (R. 69).

Item 66 series, paragraph (a) (3), which has no application to the traffic in question, also carries a similar specific exception as follows:

"Divisions via Kellogg, Ill., will not apply on traffic interchanged at East St. Louis, Ill., or St. Louis, Mo." (R. 69).

But, Item 66 series, paragraph (b), which covers the traffic in question—traffic between Missouri-Illinois stations in Illinois and the Southwest—contains no such specific exception (R. 69).

The intent of the parties is thus made crystal clear. If they had intended that the divisions on traffic between the Southwest and Illinois stations on the Missouri-Illinois should break on St. Louis, Mo.-East St. Louis, Ill., to the exclusion of Flinton, Ill., when traffic is interchanged at both of said gateways, they would have specifically so provided in Item 66 series, paragraph (b) as they did in Item series Nos. 18 and 67, and even in Item 66-series, paragraph (a). The absence of such a specific exception in Item 66-series, paragraph (b), clearly indicates an intent that the divisions of the revenue on the traffic in that category would divide over Flinton.

Since Item 66-series is admitted by respondent to be an exception to the general provisions of the division sheet, the construction of the contract by the Court of Appeals which renders meaningless the exception expressed therein should be avoided. **Andrew Jergens Co. v. Woodbury, Inc. (1921), 273 F. 952, 959, affirmed 3 Cir. 279 Fed. 1016, Certiorari denied 260 U. S. 728, 43 S. Ct. 92; 17 Corpus Juris Secundum, Contracts, Section 343.**

Further evidence of the intent that the involved divisions should break on Flinton, is the fact that the Kellogg and Flinton gateways, the only two gateways served by the Missouri-Illinois Railroad, were added when the Missouri-Illinois became a party to the division sheet (R. 83, 84). There are several routes between Greig, Oklahoma, and Selmaville, Illinois, in which the Missouri-Illinois Railroad participates via one or the other of those gateways and at which the traffic must be interchanged. One route is via the Frisco from Greig, Oklahoma, to Ste. Genevieve, Missouri, thence Missouri-Illinois to Selmaville, Illinois (R. 89, 149, 150). Kellogg is indisputably the divisional gateway over that route and the joint revenue would divide 22% to the Missouri-Illinois and 78% to the Frisco (R. 83). Another route is the route over which the traffic moved, namely, via the Frisco from Greig, Oklahoma, to St. Louis, Missouri, thence Missouri Pacific to Flinton, Illinois, thence Missouri-Illinois to Selmaville, Illinois. Via this latter route the Missouri Pacific would perform a service from St. Louis, Mo., to Flinton, Ill., which is about equal in miles to that from St. Louis, Mo., to Ste. Genevieve, Mo., of which the Frisco would be relieved (R. 89). It is perfectly obvious, therefore, that the Missouri-Illinois would want to protect its division of 22% of the revenue regardless of the route over which the traffic might move. It therefore insisted that Flinton, Illinois, as well as Kellogg, be added as a gateway and that the factors to and from Kellogg, Illinois, apply to and from Flinton (R. 83).

The service performed by the Missouri Pacific over the route of movement, being equal in miles to the service of which the Frisco would be relieved if the traffic had moved via Ste. Genevieve, it is reasonable that the Frisco should share its portion of revenue with the Missouri Pacific. The services performed by the Missouri-Illinois would be substantially the same over either route (R. 89).

The record shows, we submit, that the Missouri-Illinois Railroad Company became a party to the division sheet upon the understanding, adequately expressed, that revenue derived from traffic from the Southwest destined for points on its line and received at either Kellogg or Flinton should be divided 22% to it and 78% to the carrier or carriers which transported the shipments to either of those gateways.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOS. T. RAILEY,
GEO. W. HOLMES,
TOLL R. WARE,
Counsel for Petitioners.

Dated: February 4th, 1955.

STATUTES INVOLVED.

Interstate Commerce Act.

Section 1 (4), 54 Stat. 900; 49 U. S. C. A., Section 1 (4).

Sec. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 6 (1), 24 Stat. 380; 25 Stat. 855; 34 Stat. 586; 41 Stat. 483; 49 Stat. 543; 49 U. S. C. A., Section 6 (1).

Sec. 6 (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established

rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Section 8, 24 Stat. 382; 49 Stat. 543; 49 U. S. C. A., Section 8.

Sec. 8. That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9, 24 Stat. 382; 49 Stat. 543, 49 U. S. C. A., Section 9.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Section 16 (3) (a), 43 Stat. 633; 49 Stat. 543; 54 Stat. 913; 49 U. S. C. A., Section 16 (3) (a).

Sec. 16. (3) (a) All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

Section 16 (3) (e), 43 Stat. 633; 49 U. S. C. A., Section 16 (3) (e).

Sec. 16. (3) (e) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 15,038.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor; and Missouri-Illinois Railroad Company, a corporation,
Appellants,

vs.

St. Louis-San Francisco Railway Company,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[December 23, 1954.]

Toll R. Ware (Thos. T. Railey and George W. Holmes were with him on the brief), for appellants.

John E. McCullough (James L. Homire, Alvin J. Baumann, and Ernest D. Grinnell, Jr., were with him on the brief), for appellee.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Woodrough, Circuit Judge.

This appeal is taken to reverse the judgment rendered in favor of the plaintiff in the action St. Louis-San Francisco Railway Company against the defendant Missouri-Illinois Railroad Company[1] in the sum of $361,078.05 with interest and costs in accord with the findings of fact and conclusions of law drawn as directed by the district court in its opinion in the case reported at 117 F. Supp. 57.

As stated in that opinion, the suit was one "arising out of a dispute between the plaintiff and defendants over the division of revenue arising from the transportation of 7,131 tank cars of crude petroleum oil, transported from Greig, Oklahoma, to Selmaville, Illinois, during the period from June 1, 1944 to October 31, 1945. The parties plaintiff and defendants are railroads engaged in interstate commerce subject to the Interstate Commerce Act, and while all parties are Missouri corporations jurisdiction of this court is conferred by the Interstate Commerce Act, 49 U. S. C. A., sec. 1, et seq."

"The cars in question were routed via the St. Louis-San Francisco Railway Company (hereinafter referred to as Frisco), from Greig, Oklahoma, to St. Louis, Missouri, thence via Missouri-Pacific Railroad Company (hereinafter referred to as Missouri Pacific), to Flinton, Illinois, thence via Missouri-Illinois Railroad Company (hereinafter referred to as Missouri-Illinois), to Selmaville, Illinois, and so moved. This routing of the cars was over a through route to which a joint through rate was applicable. The division of the freight rates was made by the

[1] The Missouri Pacific, defendant below and co-appellant here, owns a majority of the voting stock of the Missouri-Illinois and has an option on the remainder.

Missouri-Illinois, the settling carrier, and 22% of the total revenue was allotted to the Missouri-Illinois, and 78% to the Frisco and Missouri Pacific, of which 78% the Frisco was allotted 65% and the Missouri Pacific 35%."

The plaintiff objected to the division as made, claiming that the total amount of $1,322,630.31 which was collected by application of the lawful joint tariff for the transportation from Greig, Oklahoma, a station of the Frisco in Southwestern Territory, to Selmaville, Illinois, a station on the Missouri-Illinois Railroad in Illinos Freight Association Territory moving through the St. Louis-East St. Louis Gateway and interchanged thereat, was lawfully required to be 78% to the carrier within the Southwestern Territory, namely, the plaintiff Frisco, and 22% to the defendant carriers within the Illinois Freight Association Territory, namely, the Missouri-Illinois and the Missouri Pacific.

The Frisco accordingly brought this action to recover the percentage which it claimed to be its lawful share and the Court having found that it had jurisdiction under the Interstate Commerce Act, declared that "the only question before the court is whether the Missouri-Illinois, the settling carrier, properly divided the revenue." The court stated, "It is undisputed that Southwestern Lines Division Sheet 100 and the supplements thereto in force and effect during the period in which the shipments were made governed the division of revenue. The Missouri-Illinois interpreted the Division Sheet and supplements thereto as providing that the gateway for division purposes was Flinton, Illinois, whereas the plaintiff contends that the gateway for division purposes was St. Louis, Missouri-East St. Louis, Illinois. The question for the court is the interpretation of the contracts between the parties, to wit, the Division Sheet and the supplements thereto, since they

form the basis for division of revenue. Division Sheet 100 when originally issued in 1931 did not apply to the Missouri-Illinois. As a result of the supplements to the Division Sheet after 1942, by agreement the Missouri-Illinois made the Division Sheet applicable to it. Under the Division Sheet as originally issued, St. Louis-East St. Louis was one of the divisional gateways, and when the Missouri-Illinois became a party to the Division Sheet, Kellogg, Illinois, was established as one of the divisional gateways, and thereafter Flinton, Illinois, was established as one of the divisional gateways. It is undisputed that in certain instances under the Division Sheet and the supplements thereto, St. Louis, Missouri-East St. Louis, Illinois; Kellogg, Illinois; and Flinton, Illinois, are divisional gateways. With respect to the shipments in question, the interchange at Flinton was intra rather than interterritorial, and under the principles and formula set up in Division Sheet 100 and supplements thereto, the gateway for division purposes on the freight in question would be at St. Louis, Missouri-East St. Louis, Illinois, unless there was a specific exception making Flinton the gateway. The supplements set forth a number of exceptions to the principles and formula of the Division Sheet, but the court is unable to find any exception with respect to the movement in question. The Division Sheet does not deal with each gateway individually, but assumes that certain principles will determine which gateway governs, unless specifically provided to the contrary. There is nothing in the supplements to the Division Sheet to indicate that St. Louis, Missouri-East St. Louis, Illinois, is not the division point, and absent such a specific provision, the broad plan and its established principles would lead us to the conclusion that St. Louis-East St. Louis was the gateway for division purposes for the shipments in question, since it was at that

point that there was an interchange between the two territories and between carriers. The plaintiff is therefore entitled to judgment with interest from the date of its demand."

In preparing the findings, conclusions and judgment, St. Louis, Missouri-East St. Louis, Illinois, was used as the gateway for the purpose of dividing the revenue rather than the station Flinton, Illinois, which had been used by the Missouri-Illinois. It is agreed that if the court had jurisdiction and if St. Louis instead of Flinton was the applicable gateway and if the suit was timely brought, the judgment was right.

(1). **As to the findings of fact.**

Appellants contend for reversal that the trial court erred in making findings of fact numbered 15, 16 and 17, which read as follows:

"15. The evidence sustains a principle—the Docket 15234 principle—that on all interterritorial traffic between Southwestern Territory and Western Trunk Line-Illinois Freight Association Territory the gateway on the boundary where the traffic passes from one territory to another is the governing gateway for interterritorial divisional purposes, not only when interchange occurs at that gateway but also when traffic passes through it without interchange, unless there is a specific provision in Division Sheet 100 (or its supplements) or an agreement to the contrary.

"16. There are no specific exceptions in Division Sheet 100, or any of its supplements, or any agreements which would nullify St. Louis-East St. Louis as the interterritorial divisional gateway on the traffic here in issue.

"17. St. Louis, Mo.-East St. Louis, Ill., is the interterritorial divisional gateway on the traffic here involved."

The position of appellants is that "the primary divisions in dispute break on Flinton, Illinois" and that such division is "specifically required by the provisions of Item 66 of Supplement 46 and applicable reissues thereof to Southwestern Lines Division Sheet 100."

In support of their position they stress that Missouri-Illinois was not a party to the proceedings before the Interstate Commerce Commission in Docket No. 15234 Division of Freight Rates (1928), 148 ICC 457; 156 ICC 94, and that the divisions as published in Southwestern Lines Division Sheet 100 were not prescribed divisions as to it. They argue that their divisions are not by compulsion of an interstate Commerce order but by voluntary agreement. They concede and assert as found by the trial court that the Interstate Commerce Commission in arriving at its cease and desist order in Docket 15234 adopted and enforced a principle referred to as the "15234 principle" to the effect that "the interterritorial divisional break should be made at the gateway at which the traffic passes from one territory to another" but they contend that the division here involved is not controlled by that principle. They contend that the following provisions of Item 66-B of Supplement 52 to Southwestern Lines Division Sheet 100 require that Flinton be taken as the gateway for division of the moneys in question:

"Special application to and from points of Missouri-Illinois Railroad.

"The basis of divisions published herein to and from points on the Missouri-Illinois are subject to application rules and regulations published in the Division Sheet as amended, except as follows:

"• • • • • • •

"(b) Between M-I RR stations in Illinois and the Southwest (section 2).

"(2) Factors to and from Kellogg, Ill., will also apply to or from Flinton, Ill." * * *

A witness for the defendants also presented assumed through freight movements and divisions thereon which it was contended illustrated and confirmed the defendants' claim that Flinton was the proper gateway for revenue division purposes herein.

On the other hand, the plaintiff contended in the trial court and repeats here that the findings 15, 16 and 17 are supported by substantial evidence. It agrees that Item 66 is the item of Division Sheet 100 which identifies the exceptions from the general provisions of the Division Sheet applicable to and from Illinois and Southwestern territory, paragraph (a) of that item being exceptions to the general application of the Sheet dealing with points on that railroad in Missouri and (b) being the exceptions dealing with the points in Missouri. But it contends that the words at the end of the opening paragraph "except as follows" are not meant to exclude all of the portions of the Division Sheet except those which follow in Item 66 itself. They are not intended to and do not constitute Flinton, Illinois, as the gateway for the traffic in question. On the contrary, they mean when considered in their context that if and when Flinton, Illinois, may by some appropriate provision of Division Sheet 100 or by agreement, be made the applicable gateway in a given case the factors to use in making the division will be the Kellogg, Illinois, factors. Admittedly, no such provision is made elsewhere in Division Sheet 100 or by separate agreement so far as the involved shipments are concerned, and it is insisted for appellee that as to such shipments that such a provision would be inconsistent with the application of the Division Sheet.

In that regard appellee points out that Flinton, Illinois, is not located on the boundary of two territories and the shipments did not there pass from one territory to another, but did so at St. Louis. Flinton could not, therefore, be taken as the gateway under Division Sheet 100 without some specific application in the Sheet or other agreement providing therefor. The testimony for the plaintiff tended to show that in all instances where departures from or exceptions to the Docket 15234 principle have been made in divisions on shipments which have passed from Southwestern to Illinois Freight Association Territory there is involved service performed by a Southwestern carrier to (or from) and through a named gateway without interchange with continuing service (by either the same line or by that line in conjunction with another line otherwise identified in the Sheet as a Western Trunk Line-Illinois Freight Association carrier) in Western Trunk Line-Illinois Freight Association Territory to (or from) another named gateway and there interchanged for service to (or from) a destination (or origin) in Western Trunk Line-Illinois Freight Association Territory.

On consideration of the evidence, we think that each of the findings, 15, 16 and 17, is supported by substantial evidence and none is clearly erroneous. We think that when Division Sheet 100 is considered in its entirety and effect is given to the principle established by the Interstate Commerce Commission in Docket 15234 in Compliance with which the Division Sheet 100 and Supplements are issued, it must be held that St. Louis-East St. Louis, through which the shipments here passed from one territory to the other and at which they were interchanged, was the proper territorial gateway to be used for division of revenue in this case. It clearly appears that the judgment of the District court is supported by past practice and also that it re-

sults in compensation to all parties reasonably related to the service. The evidence[2] is that Frisco carried each shipment 535.3 miles from Greig, Oklahoma, to St. Louis, Missouri; Missouri Pacific carried them 53.3 miles and Missouri-Illinois 75.4 miles, a total for the two of 128.7 miles. The judgment awarded the Frisco 78% and the other two roads 22%. The use of Flinton as the gateway resulted in 50.7% for transporting the shipment 80.6% of the total distance and 49.3% for transporting it 19.4% of the distance.

(2). **As to Jurisdiction.**

Appellants have earnestly insisted that there was no jurisdiction of this action in the federal District court. It was admitted that there was no diversity of citizenship and appellants argue that the action should be considered as simply an action for money due under a contract or for an accounting for moneys received for the use of the plaintiff. But we affirm the holding of the trial court that "jurisdiction of this court is conferred by the Interstate Commerce Act, 49 U. S. C. A., section 1 et seq."

The essential purpose of the action was to enforce a right of the plaintiff to have the defendants perform a duty prescribed by Section 1 (4) of the Act which provides:

"It shall be the duty of every common carrier subject to this part * * * in case of joint rates, fares or charges, to establish just, reasonable and equitable divisions thereof which shall not unduly prefer or prejudice any of such participating carriers."

The duty to "establish" the just divisions can not be construed as limited to merely signing writings concerning them. As used in the text, the duty to "establish just di-

[2] Taken from appellee's brief and not disputed.

visions" meant to originate, agree upon and apply such divisions in conducting the business to which the statutory regulation applies. As stated by the Supreme Court in **Alton Railroad v. United States**, 287 U. S. 229 (loc. cit. 235-6), "each carrier is entitled as of right to the divisions agreed upon," and the duty to make the division according to law derives directly from the Interstate Commerce Act.

Sections 8 and 9 of the Interstate Commerce Act provide authority to sue for any part of interstate freight divisions claimed to be wrongfully withheld from one carrier by another. The sections provide:

"That in case any common carrier subject to the provisions of this part * * * shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part * * * (49 U. S. C. A., Sec. 8).

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any District or Circuit Court of the United States of competent juirsdiction; * * * (49 U. S. C. A., Sec. 9)."

The federal courts have long exercised jurisdiction of suits brought to enforce duties imposed upon carriers by the Interstate Commerce Act. **In Re Lennon**, 166 U. S. 548, 553; **Produce Realty Corporation v. N. Y., N. H. & H. Railroad Co.**, 116 F. Supp. 451.

In addition to Sections 8 and 9 of the Interstate Commerce Act, the jurisdiction is plainly conferred by Section

1337 of the Judicial Code, 28 U. S. C. A., Section 1337, which provides:

"The District Courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *."

In development of the regulation of the nation's railroads the regulation of the rates charged by the individual roads in interstate commerce was followed by regulation of the joint rates and a vital element of the regulation of joint rates was regulation of the division of them among the carriers jointly engaged in the interstate haul. The defining of territories and establishment of gateways and their use for purposes of such divisions was a necessary incident. Where, as in this case, the complaint is that a carrier subject to the Act has denied the plaintiff the share of joint revenue due it by reason of a controlling principle established by the Interstate Commerce Commission, the action arises under the Act regulating Commerce, within the intendment of Section 1337.

49 U. S. C. A. preceding Section 1, reads:

"It is hereby declared to be the National Transportation Policy of the Congress * * * to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices; * * * All provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

As the fixing of gateways to be used for division of joint revenues is a fundamental part of the function of division of joint transportation receipts the dispute as to the point to be used for the purpose of division here presents a federal question. The intent of Congress is to accomplish uni-

form regulation and it is necessary that there be a single authority to settle the division of the proceeds of joint traffic which passes over more than one state. Although the Division Sheets "issued in compliance with Interstate Commerce Commission Opinion and Order" are not strictly tariff sheets or published as such, substantially the same grounds of federal jurisdiction are present in respect to a suit to recover a part of a division for interstate transportation under the Division Sheets as over a suit to recover sums due from a shipper under a published tariff. We find no error in the ruling that the court had jurisdiction.

(3). **As to the Statute of Limitations.**

Appellants contend that plaintiff's cause of action was barred by the statute of limitations of Sections 16(3)(a) and 16(3)(c) of the Interstate Commerce Act in that the suit was not begun within two years after the cause of action accrued. As shown by stipulation, the transportations here involved occurred during the period June 1, 1944 to October 31, 1945, and formal demand for payment was made upon the defendant Missouri-Illinois Railroad Company in accordance with the applicable accounting rules of the carriers on August 25, 1947. The suit was brought January 29, 1952.

Sections 16(3)(a) and 3(c) read as follows:

"16(3)(a). All actions at law by carriers subject to this part for recovery of their charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after."

"16(3)(c). The cause of action in respect of a shipment of property shall for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after."

Appellants' contention is that the lapse of time before commencement of the action "destroyed the liability". Their reliance is upon **Midstate Co. v. Penn R. Co.**, 320 U. S. 356.

But the precise question was considered by the court in **Atlantic Coast L. R. Co. v. Baltimore & Ohio R. Co.**, 12 F. Supp. 711 (loc. cit. 718-719), and we are in accord with the court's declaration in that case that "these provisions [49 U. S. C. A., section 16(3)(a-c)] seem to contemplate actions or complaints between carriers and shippers, and not between carriers only. (a) and (c) also seem clearly inapplicable because the complaint here is not for the recovery of 'charges' or 'over charges.'" That decision appears to have been accepted by the railroads since its promulgation in 1935 without any protest that we know of by the Interstate Commerce Commission which is primarily charged with the railroad regulation involved in divisions from interterritorial hauls. And we adhere to it.

We find no error in the judgment appealed from and affirm it at appellants' costs.

Johnsen, Circuit Judge, concurring.

I have been unable to persuade myself that there was not a sufficient basis, on the entire documentary situation, facially and contextually, for the trial court to hold, as it did, that in the correlation of Item 66-B with Division Sheet 100, under the recognized control of the Division Sheet by the Docket 15234 principle, the language of paragraph (b) (2) of Item 66-B was not sufficient, in specificness, unambiguity and lack of other possible meaning, to require that it be accorded the legal effect of, and accepted

as a standard for, limiting or nullifying in the situation the application of the interterritorial primary-division breaking-point rule. I accordingly concur in this part of Judge Woodrough's opinion.

The only portion of the opinion that has bothered me somewhat is the construction made of 49 U. S. C. A. § 16(3) (a) and (e), through the adoption of Judge Chestnut's language in **Atlantic Coast Line R. Co. v. Baltimore & O. R. Co.**, D. C. Md., 12 F. Supp. 711, 718, that "These provisions seem to contemplate actions or complaints between carriers and shippers, and not between carriers only." I can see no reason on the statute to believe that, when Congress deemed it advisable, in the interest of uniformity and certainty, to impose a limitation on "All actions at law by carriers * * * for recovery of their charges, or any part thereof", it was in any way concerned about or intending to have regard for any theories, forms, technicalities and distinctions in common law actions or recoveries. I think it was fixing a time, as a general transportation-code policy, within which a carrier had to act to recover its transportation charges or revenues against anyone who owed it the duty of making payment thereof as such. And certainly what is here being recovered is in fact transportation charges or revenues.

Both of my colleagues, however, feel that Judge Chestnut's construction of the statute has probably had such acceptance and reliance in the railroad world as to be entitled to stand on the basis of stare decisis. I am without any enlightenment or data in the situation on this score, either from the briefs or otherwise, but I shall, for the sake of unanimity, go along and accept my colleagues' respected view on the point.

Sanborn, Circuit Judge, dissenting.

I have been unable to discover any satisfactory reason for deciding that the division of the freight revenue in suit based on Flinton, Illinois, was unlawful. I agree that if the applicable supplement to Division Sheet 100 adding Flinton as a gateway for traffic from the Southwest to points on the Missouri-Illinois Railroad Company is ambiguous with respect to the division of revenues on such traffic, the conclusion of the District Court should not be overturned. But the fact that the division of revenue of which the appellee complains is unfair to it would not, in the absence of ambiguity, justify a court in amending the applicable Division Sheet as supplemented.

It seems to me that the record shows that the Missouri-Illinois Railroad Company became a party to the Division Sheet in suit upon the understanding, adequately expressed, that revenues derived from traffic from the Southwest destined for points on its line and received at either Kellogg or Flinton should be divided 22% to it and 78% to the carrier or carriers which transported the shipments to either of those gateways. Apparently, Kellogg and Flinton were the only points through which traffic from the Southwest could move to points on the Missouri-Illinois Railroad. The expert witnesses who testified seem to have been in substantial accord with respect to the proposition that if it had been intended to exclude Flinton as a basing point for the division of revenue on shipments such as those in suit, there should have been an exception in paragraph (b) of Item 66-B of the applicable supplement to the effect that divisions via Kellogg or Flinton would not apply on traffic from the Southwest interchanged at East St. Louis, Illinois, or St. Louis, Missouri.

I agree that the District Court had jurisdiction of this action, and that the claim of the appellee was not barred or extinguished by limitations. I am, however, of the opinion that there was an inadequate basis for determining that the Missouri-Illinois Railroad Company's division of the joint revenue on the traffic in suit was unlawful. The judgment appealed from should, I think for that reason only, be reversed.

A true copy.

Attest:

E. E. Koch,
Clerk, U. S. Court of Appeals, Eighth Circuit.

(Seal)

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HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 578.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; and MISSOURI-ILLINOIS RAILROAD COMPANY, a Corporation,
Petitioners,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES L. HOMIRE,
JOHN E. McCULLOUGH,
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IN THE

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No. 578.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; and MISSOURI-ILLINOIS RAILROAD COMPANY, a Corporation,
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ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petitioners' statement of the case (Petition pp. 3-6) does not present the facts sufficiently to develop the manner in which the case arose, the position of the parties on the questions presented, or the holdings of the Courts below. We, therefore, offer the following statement so that the Court may be more fully advised on these matters.

The Petition for Writ of Certiorari seeks review of a judgment of the Court of Appeals for the Eighth Circuit

which affirmed a judgment of the United States District Court for the Eastern District of Missouri, Eastern Division, rendered against the Petitioner, Missouri-Illinois Railroad Company, for $361,078.05 with interest at the rate of 6% per annum from August 25, 1947, together with costs (R. 160), in an action arising out of a dispute between the parties, common carriers by railroad engaged in interstate commerce, and subject to the provisions of the Interstate Commerce Act (49 U. S. C., Sec. 1 et seq., hereinafter called "the Act") (Supp. R. 2), over the construction of Southwestern Lines Division Sheet 100 and Supplements 24, 25, 46, 47, 48, 51, 52 and 53, thereto (Pl. Exs. 1-9, reproduced in part, R. 21-69, Supp. R. 10-32, hereinafter collectively called "the Division Sheet" or "Division Sheet 100"). The Division Sheet was published pursuant to an agreement between numerous rail carriers, including Petitioners and Respondent (Supp. R. 4)—originally entered into after extensive hearings, reports* and an order (R. 136-140) by the Interstate Commerce Commission. It provides, among other things, for the division between the parties thereto of revenue determined by the use of commodity joint rates as published in a joint agency tariff (Supp. R. 7) filed with the Interstate Commerce Commission as provided in Section 6 (1) of the Act [49 U. S. C., Sec. 6 (1)] for the transportation of 7,131 tank cars of crude petroleum oil from Greig, Oklahoma, to Selmaville, Illinois, during the period June 1, 1944, to October 31, 1945 (Supp. R. 2). All said cars of petroleum oil were routed via the St. Louis-San Francisco Railway Company (Frisco), Respondent, from Greig, Oklahoma, to St. Louis, Missouri, thence via Petitioner railroads, Missouri Pacific Railroad Company to Flinton, Illinois, and Missouri-Illinois Railroad Company to Selmaville, Illinois, and so moved (Supp. R. 9). This routing of said cars was over a through route to which a joint through rate was applicable (Supp. R. 9).

* See 148 I. C. C. 457-483 and 156 I. C. C. 94-106.

The total revenue derived from the transportation of the crude petroleum oil amounted to $1,322,630.31. Said sum was prepaid by the shipper to Frisco as the originating carrier, and Frisco credited the entire sum to Missouri-Illinois as the settling carrier, in conformity with the applicable Railway Accounting Rules (Supp. R. 3).

Missouri-Illinois then distributed, i. e., divided, said revenue according to its interpretation of Division Sheet 100, crediting itself with the sum of $290,978.68, or 22% of the total revenue; crediting Frisco with the sum of $670,573.58, or 50.7% of the total revenue; and crediting Missouri Pacific with the sum of $361,078.05, or 27.3% of the total revenue (Supp. R. 3).

Divisions, as claimed by Respondent, based upon St. Louis-East St. Louis as the interterritorial divisional gateway would have given to the Frisco 78% of the total revenue, or $1,031,651.63, and to Petitioners jointly 22% of the total revenue, or $290,978.68 (Pl. Ex. 12, Supp. R. 33-35; Pl. Exs. 29, 29-A, Supp. R. 75-79).

The settlements made by the Missouri-Illinois reflect the use by it of the divisional factors in Division Sheet 100 to and from Flinton, Illinois, disregarding the divisional factors to and from St. Louis-East St. Louis, and were predicated upon the contention that Division Sheet 100 provided divisions based on Flinton, Illinois, as the primary divisional gateway, notwithstanding the fact that all the shipments moved through the St. Louis-East St. Louis gateway, were interchanged thereat, and there passed from Southwestern Territory into Illinois Freight Association Territory.

Respondent brought this suit in the District Court to recover the difference between the amount of money credited to it by the Missouri-Illinois using Flinton, Illinois as the interterritorial divisional gateway, and the sum to which it claimed it was rightly entitled by using

St. Louis-East St. Louis as the interterritorial divisional gateway.

The complaint, as amended, based jurisdiction upon the allegation that the action arose under the Interstate Commerce Act, 49 U. S. C., § 1 et seq. (R. 17),* and prayed judgment against Missouri-Illinois or in the alternative for judgment against Missouri-Illinois and Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, for the specific portion of the sum claimed which each of them received as a result of the erroneous construction of the Division Sheet (R. 5).

By stipulation (Supp. R. 1-9) the parties narrowed the issues so that the District Court was required to decide only whether it had jurisdiction and whether the Missouri-Illinois had properly applied Division Sheet 100.

After receiving evidence concerning the interpretation of the Division Sheet, the District Court issued a memorandum opinion, 117 Fed. Supp. 57, and findings of fact and conclusions of law in which it concluded, among other things: (1) that the action arose under the Interstate Commerce Act; (2) that jurisdiction was conferred upon it by that Act; (3) that resort to the Interstate Commerce Commission was unnecessary in this case; (4) that Division Sheet 100 and its supplements were published pursuant to a duty imposed by the Act; and (5) that when the Missouri-Illinois wrongfully divided the revenue contrary to the applicable provisions of the Division Sheet, it omitted to do an act required to be done by the Interstate Commerce Act (R. 159).

In construing the Division Sheet, the District Court found that "the evidence sustains a principle—the Docket 15234 principle—that on all interterritorial traffic between South-

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* There is no diversity of citizenship, all parties being citizens of the State of Missouri (R. 1-2, Supp. R. 2).

western Territory and Western Trunk Line—Illinois Freight Association Territory the gateway on the boundary where the traffic passes from one territory to another is the governing gateway for interterritorial divisional purposes, not only when interchange occurs at that gateway but also when traffic passes through it without interchange, unless there is a specific provision in Division Sheet 100 (or its supplements) or an agreement to the contrary" (R. 158). The Court further found that there were no exceptions in the Division Sheet which would nullify St. Louis-East St. Louis as the interterritorial divisional gateway on the traffic in question, and that St. Louis-East St. Louis was the interterritorial gateway on the traffic involved (R. 158) and gave Respondent judgment against Missouri-Illinois for the full amount prayed (R. 160).

Petitioners appealed and the Court of Appeals found that the findings of fact of the District Court were supported by substantial evidence. The Court of Appeals held that federal jurisdiction of this type of case was necessary to accomplish the intent of Congress to provide uniform regulation concerning divisions, and affirmed the holding of the District Court that jurisdiction was conferred by the Interstate Commerce Act. All three judges concurred in this holding which was based upon the premise that the "* * * essential purpose of the action was to enforce a right of the plaintiff to have the defendants perform a duty prescribed by Section 1 (4) of the Act * * *" (Opinion p. 9), which provides that it shall be the duty of every common carrier in the case of joint rates to establish just, reasonable and equitable divisions thereof which shall not unduly prefer or prejudice any participating carrier.

The Court of Appeals further held that the duty to "establish" just divisions could not be limited to merely

signing writings concerning them, but "meant to originate, agree upon and **apply such divisions** in conducting the business to which the statutory regulation applies" (Opinion p. 10, emphasis added). Since the duty to make the division according to law derives directly from the Interstate Commerce Act, Sections 8 and 9 of that Act provide authority to sue in the District Court for any part of interstate freight divisions claimed to have been wrongfully withheld from one carrier by another. In addition to Sections 8 and 9 of the Interstate Commerce Act, the opinion held that jurisdiction was plainly conferred by Section 1337 of the Judicial Code (28 U. S. C., Sec. 1337) (Opinion p. 11).

One judge delivered a separate opinion in which he specifically concurred in the holdings that the District Court had jurisdiction and that the statute of limitations was not applicable. His dissent was limited to his view of the merits.

The question of the application of the limitation provisions of Sections 16 (3) (a) and (e) of the Act [49 U. S. C., Sec. 16 (3) (a) (e)] to the present suit was not raised by Petitioners until the filing of their Reply Brief in the Court of Appeals. For that reason the District Court did not, of course, make any specific pronouncement concerning these sections.

The Court of Appeals, however, specifically held that these sections did not apply to this action "because the complaint here is not for the recovery of 'charges' or 'overcharges' " (Opinion p. 13). One judge of the Court of Appeals, in a separate concurring opinion, expressed some hesitancy in joining in this ruling, but did not dissent from the view of the other two judges, both of whom ruled that the sections did not apply to this action.

REASONS FOR DENYING THE WRIT.

I.

The Action Arose Under the Interstate Commerce Act and Jurisdiction Is Conferred by That Act and by Section 1337 of the Judicial Code.

By an incomplete process of elimination, Petitioners attempt to show that no federal question is presented by the facts in this case. First, they say, that the existence or non-existence of divisions is not a tariff matter and since this case does not involve the construction of a tariff, no federal question is involved. In support of this proposition they cite **Great Northern Ry. Co. v. Merchants Elevator Co.** (1922), 259 U. S. 286, 290, a suit brought by a shipper to recover overcharges from a carrier in which this Court held that, in some instances, the Courts have jurisdiction to construe the provisions of a tariff without preliminary resort to the Interstate Commerce Commission. Nothing in that case can be construed as defeating jurisdiction here because an entirely different situation was involved. Parenthetically, however, it might be noted that the discussion by the Court of Appeals in this case, concerning the desirability of uniform decision and regulation, is in full accord with the views of this Court on uniformity as stated in the **Great Northern Case.**

Secondly, Petitioners say that the mere fact that a carrier is under the Interstate Commerce Act is not sufficient, in and of itself, to confer jurisdiction, citing **Kansas City, Kansas, v. A., T. & S. F. Ry. Co.** (U. S. D. C. Kan., 1951), 101 F. Supp. 1, 5, a suit to force repayment of an overcharge on an **intrastate** shipment. Obviously that case does not have any factual similarity with this case or announce any principle which could defeat jurisdiction in the present case.

Finally, Petitioners say that the present suit is merely a breach of contract case and that the construction of that contract does not involve the construction of any federal law. In support of this proposition they cite **California Oil & Gas Co. v. Miller** (C. C. Calif., 1899), 96 Fed. 12, a quiet title suit; **McGoon v. Northern Pac. Ry.** (D. C. N. Dak., 1913), 204 Fed. 998, a suit by a shipper to recover alleged damage to livestock by reason of defendant's failure to perform its duty as a common carrier in which removal to a federal court was held proper on the grounds that the suit was brought to enforce a right granted by federal law; **Shulthis v. McDougal** (1912), 225 U. S. 561, a suit brought to determine conflicting rights to a tract of land in the Creek Nation; **Gully v. First Natl. Bank** (1936), 299 U. S. 109, 112-114, a suit by a state tax collector against the successor to an insolvent bank to recover taxes owed by the insolvent bank; and **Consolidated Freightways, Inc., v. United Truck Lines** (C. A. 9, 1954), 216 F. 2nd 543, a suit to recover damages based upon an alleged violation of the provisions of Part II of the Interstate Commerce Act, which was specifically dismissed because Part II of that Act did not contain sections comparable to Sections 8 and 9 of Part I of the Act.

The fallacy of Petitioners' reasoning is apparent. By overlooking the basic nature of the case at bar, it being a suit brought to enforce a right of plaintiff to have defendants perform a duty prescribed by Section 1 (4) of the Interstate Commerce Act, they attempt to bolster their contention that the District Court was without jurisdiction. Broad general statements of law concerning federal jurisdiction, such as those cited by Petitioners, are of little value unless their specific application to the present case is shown. Petitioners have wholly failed to demonstrate the application of those principles to the present case.

Nothing in Petitioners' argument attempts to attack the soundness of the reasoning of the opinion of the Court of Appeals. Petitioners do not claim or cite any cases to refute the proposition that the essential purpose of this action was to enforce a right of Respondent to have Petitioners perform a duty prescribed by Section 1 (4) of the Interstate Commerce Act. Nor do they maintain that any of the authorities cited by the Court of Appeals in support of its jurisdictional holding are not applicable to the present case. Furthermore, Petitioners make no showing that any of the considerations governing review on certiorari, as stated in Rule 19 of this Court, are present.

The opinion of the Court of Appeals is in full accord with decisions of this Court. In **Alton R. v. United States** (1932), 287 U. S. 229, 235-6, this Court held that each carrier is entitled as of right to divisions agreed upon and that a carrier individually is legally without right to depart from such an agreement. If an individual carrier does so depart, it amounts to a resort to force to change the agreement rather than a judicial determination of divisions in accordance with the provisions of the Interstate Commerce Act. A party aggrieved by such a departure may, therefore, sue at law for the division wrongfully withheld.

The holding of the Court of Appeals that such a suit may be brought in a federal court because it is brought for the purpose of enforcing a duty imposed by the Interstate Commerce Act is based upon **In Re Lennon** (1897), 166 U. S. 548, 553. The basic principle announced in the **Lennon** case has been consistently followed throughout the years.

We, therefore, submit that Petitioners have wholly failed to present any valid reason for the granting of a Writ of Certiorari to consider the first question presented.

II.

The Limitation Provisions of Section 16 (3) (a) and (e), Do Not Apply to This Action.

Petitioners' argument that jurisdiction of this case is barred by the limitation provisions of Section 16 (3) (a) and (e) of the Interstate Commerce Act, 49 U. S. C. § 16 (3) (a) (e) advances three propositions: First, that the Court of Appeals broadened the meaning of Section 1 (4) of the Act by holding that the phrase "to establish just, reasonable and equitable divisions" meant to maintain and apply those divisions; second, that the Court of Appeals narrowed the meaning of Section 16 (3) (a) and (e) by holding that the limitation provisions contained therein did not apply to an action between carriers to recover divisions; and third, one involving an irrelevant play on words that the Court of Appeals was inconsistent in excepting this action from the operation of Section 16 (3) while failing to apply an exception in the construction of the division agreement. We will treat these arguments in the order stated.

The Court of Appeals, in construing the "to establish" phrase of Section 1 (4) to require the maintenance of divisions, was merely applying a sound principle announced by this Court in **Alton R. v. United States** (1932), 287 U. S. 229, 235-6, where this Court said:

> "* * * the divisions * * * were established by agreement of the carriers participating in the transportation. The divisions were a term of that agreement. So long as the joint rates voluntarily established remain in force, each carrier is entitled as of right to the division originally agreed upon, unless a readjustment of the divisions has been made either by the parties or by the Commission pursuant to the power conferred by paragraph 6 of § 15. The connecting carriers were legally without power to reduce

the divisions of the Alton over its objection. If they deemed its divisions unreasonably large, they could have invoked the power of the Commission to make a reduction. Instead of applying to the Commission to adjust the existing divisions they resorted to force. Availing themselves of their strategic position as collectors of the freight, they withheld from the Alton a part of what was due it.

"The Alton might have sued at law for the part of the divisions wrongfully withheld. St. Louis S. W. Ry. Co. v. Bolinger & Co., 17 F. (2d) 924; compare Malvern & F. V. R. Co. v. Chicago, R. I. & P. Ry. Co., 182 Fed. 685."

Petitioners' attempt to distinguish the **Alton Case** because it was brought under the Urgent Deficiencies Act (Petition p. 9) overlooks the manner in which that case arose. Divisions were wrongfully withheld from the Alton in violation of an existing agreement. The Alton appealed to the Interstate Commerce Commission for relief, but this Court held that the Alton might have sued at law—as the present Respondent chose to do—to recover the part of the divisions wrongfully withheld. In the present case the District Court held that resort to the Interstate Commerce Commission was not necessary (R. 159), and Petitioners have not objected to that holding. In this connection we submit that the Court of Appeals properly relied upon the **Alton Case.**

Petitioners' reliance upon the limitation provisions of Section 16 (3) is in the nature of a "confession and avoidance." They argue that the Court of Appeals, using a doubtful case as authority, has narrowed the application of these provisions and conferred jurisdiction by acquiescence.

The Court of Appeals specifically concluded that the limitation provisions of Section 16 (3) are not applicable

here for the reason that the complaint "is not for the recovery of 'charges' or 'overcharges'" (Opinion p. 13). The admitted facts compel such a holding.

The "charges" to the shipper for the transportation of the crude petroleum oil were prepaid to Respondent (R. 71) and transferred to Missouri-Illinois by a bookkeeping entry in accordance with the applicable accounting rules (Supp. R. 2-3). The parties stipulated as to the amount of such charges (Supp. R. 7). The transportation for which those charges were assessed was performed by the parties jointly and was completed (Supp. R. 2). Each of the railroads involved was performing common carrier service for the shipper and not for any other party to this suit. The amount of money sought by Frisco in this suit is not due it by reason of any service performed by it for the Missouri-Illinois, but is a portion of the sum collected from the shipper. The Missouri-Illinois held the total sum with a legal obligation to pay the correct portion of it to each of the carriers participating in the transportation services furnished to the shipper. The Missouri-Illinois' duty, which the Courts below held arose under the Act, was to divide the total fund properly in accordance with the division agreement. The duty to pay over a portion of the total fund to the Respondent did not arise by reason of any services rendered to the Missouri-Illinois by Respondent.

> "The word 'rate' as used in the Interstate Commerce Act means the net cost to the shipper; the net amount the carrier receives and retains for the transportation service. United States v. Chicago, etc., Co. (D. C.), 148 Fed. 646. The word 'fare' means the rate of charge for the carriage of passengers (19 Cyc. 456); money paid for a voyage or passage (Bouvier's Law Dictionary). **A charge is the price fixed or demanded for services rendered.** Fulmer v. Southern Ry. Co., 67 S. C. 262, 45 S. E. 196." (Emphasis

added.) **Clark v. Southern Ry. Co.** (Ind. App., 1918), 119 N. E. 539, 542. See also Union L. H. & P. Co. v. City of Fort Thomas (Ky., 1935), 261 Ky. 100, 87 S. W. 2d 103, 105, and United States v. C. & A. Ry. Co. (D. C. Ill., 1906), 148 F. 646, 647.

We respectfully submit that the separate concurring opinion which expressed some hesitancy as to the limitation holding may have resulted from overlooking the facts that the transportation was completed and the charges therefor paid by the shipper before this dispute arose, and that no party to the dispute performed any common carrier service for any other party to this action. This hesitancy may have arisen from the fact that the limitation provisions of Section 16 (3) were raised for the first time in Petitioners' Reply Brief in the Court of Appeals.

The opinion of the Court of Appeals is based upon **Atlantic Coast Line R. Co. v. Baltimore & Ohio R. Co.** (D. C. Maryland, 1935), 12 F. Supp. 711, which passed upon the exact point here raised. Petitioners say that the **Atlantic Coast Line Case** was a diversity of citizenship case, but they apparently overlook the fact that the limitation provisions of Section 16 (3), if applicable, defeat jurisdiction in such a case as completely as they defeat jurisdiction in a case not based upon diversity of citizenship. There is no basis for Petitioners' criticism of the Court of Appeals' statement that the **Atlantic Coast Line Case** has been accepted by the railroads without protest by the Interstate Commerce Commission. Other federal courts have accepted that decision without questioning the soundness of the holding with regard to Section 16 (3). See **Atlantic Coast Line R. Co. v. Pennsylvania R.** (D. C. Penn., 1935), 12 F. Supp. 726.

The **Atlantic Coast Line Case**, cited by the Court of Appeals, was only one of a series of cases arising out of a general division dispute concerning Florida citrus rates,

and while this series of cases produced varied results and many comments upon division disputes, none of these cases question the soundness of the construction of Section 16 (3) here followed. See **Atlantic Coast Line v. Boston & Maine** (D. C. Mass., 1937), 18 F. Supp. 886; **Atlantic Coast Line v. Delaware & H. R. Corp.** (C. C. A. 2, 1936), 86 F. 2d 721.

In **St. Louis S. W. Ry. Co. v. Bolinger** (C. C. A. 5, 1927), 17 F. 2d 924, 925, cited with approval in **Alton R. Co. v. United States** (supra), a Louisiana State limitation statute relating to the recovery of erroneous freight charges was held to have no application to a dispute concerning divisions.

Midstate Horticultural Co. v. Pennsylvania R. Co. (1943), 320 U. S. 356, cited by Petitioners (Petition, p. 10), does not pass upon the question here involved. That case correctly held that an action by a carrier to recover the full amount of transportation charges from a shipper is subject to the limitation provisions of Section 16 (3) and that these limitations cannot be extended by a separate agreement between the carrier and shipper entered into prior to the expiration of the period. The opinion of the Court of Appeals is not in any way at variance with that decision, which clearly has no application to the present case.

The claim that the Court of Appeals has been inconsistent in its treatment of "exceptions" (Petition, p. 11) is equally without foundation because such claim attempts to compare the construction placed upon a particular contract with the construction of a statute. This claim is no more than an irrelevant play on the word "exception." Manifestly, the same rules need not apply to both situations, particularly where, as here, there is no logical or factual relationship between them. The Court of Appeals affirmed the finding of the District Court that there was no appli-

cable exception in the Division Sheet. It reasoned correctly that the word "charges" in Section 16 (3) of the Interstate Commerce Act does not embrace divisions and, therefore does not apply to an action between carriers. Petitioners' argument that the Court of Appeals has read an exception into Section 16 (3) (a) when none exists because that section begins "ALL actions at law" is merely diversionary as it seeks to place emphasis upon the wrong word in the section and emasculates the controlling word, "charges." The Court of Appeals properly held that "charges" is the decisive word in determining whether Section 16 (3) (a) applies to this case.

The test as to whether this action arose under the Interstate Commerce Act is not, as Petitioners claim, whether it is subject to Section 16 (3) (Petition p. 10), but is, as the Court of Appeals properly held, whether the duty sought to be enforced derives from the Interstate Commerce Act.

Petitioners have not advanced any substantial reason why certiorari should be granted upon the second question presented. Their allegation, that it is an important federal question which has not heretofore been passed upon by this Court, is without foundation. This Court has time and again passed upon the meaning of the Interstate Commerce Act and the various sections thereof. There is no need for this Court to concern itself with the definition of the word "charges" in a case where the fund involved and the sum sought are clearly outside of any standard definition of that word. This is especially true when all lower Federal Courts which have passed upon the matter are in accord.

We, therefore, submit that the Court of Appeals correctly decided that Section 16 (3) (a) and (e) has no application to the present action and for that reason a Writ of Certiorari should not be granted.

III.

Disagreement With the Decision of the Court of Appeals on the Merits Does Not Constitute Adequate Grounds for a Writ.

Petitioners' argument under the subject "Primary Divisions Break Over the Flinton, Illinois, Gateway," merely represents a restatement of Petitioners' position on the facts of the case as presented to both the District Court and the Court of Appeals.

The basis of Petitioners' argument is an alleged admission by Respondent that Item 66-B of Supplement 52 is "an exception to the general provisions of the Division Sheet" (Petition pp. 11, 14). Actually no such admission was made. Petitioners refer to page 127 of the Record as authority. For a proper narration of the testimony, see page 64 of the Supplemental Record which shows that the witness was not discussing the traffic involved in this case, but was explaining the application of this item to a movement illustrated in Plaintiff's Exhibit 24 (Supp. R. 65). This same argument was advanced by Petitioners in the Court of Appeals and we think that the discussion, beginning on page 5 of that Opinion, amply answers all of the contentions now advanced by Petitioners.

Nowhere is it alleged that the Court of Appeals has decided the case contrary to any other decision on the same matter, or in any way is in conflict with any decision of this Court. Likewise it is not alleged that the decision of this question presents an important question of Federal law which has not heretofore been settled by this Court.

The Courts below were called upon to decide the meaning of a written agreement. Much of the evidence presented to the District Court was presented by way of stipulation. The disputed evidence in the case represents the

conflicting opinions of qualified experts on the subject. The District Judge, upon considering all of this evidence, was of the opinion that St. Louis-East St. Louis was the inter-territorial divisional gateway on the shipments involved. This opinion was affirmed by the Court of Appeals which found that the findings and conclusions of the District Court were supported by substantial evidence. Under well-established rules, this Court has, for many years, accepted findings in which two courts concur, unless clear error is shown. [**Texas & N. O. R. Co. v. Ry. Clerks** (1930), 281 U. S. 548, 558; **Alabama Power Co. v. Ickes** (1938), 302 U. S. 464, 477; **Graver Mfg. Co. v. Linde Co.** (1949), 336 U. S. 271, 274-5]. Petitioners have neither alleged nor shown any such error.

CONCLUSION.

Since the petition does not disclose that the opinion of the Court of Appeals conflicts with the decision of any other Court of Appeals on the same matters, and does not disclose that any important question of Federal law not previously decided by this Court is here presented, and does not disclose that any Federal question has been decided in a way in conflict with applicable decisions of this Court, we submit that the petition for a writ of certiorari should be denied.

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Dated February 28, 1955.

Office - Supreme Court
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HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 578.

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor; and MISSOURI-ILLINOIS RAILROAD COMPANY, a Corporation,
Petitioners,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,
Respondent.

PETITIONERS' REPLY

To Brief of Respondent in Opposition to Petition for Writ of Certiorari.

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Respondent.

PETITIONERS' REPLY

To Brief of Respondent in Opposition to Petition for Writ of Certiorari.

REPLY TO RESPONDENT'S STATEMENT OF CASE.

Petitioners' statement of the case was sufficient, in our opinion, to support the three questions presented. Two of those questions go to the jurisdiction of the federal courts; and the other goes to the merits of the case—to the interpretation of the governing item of the division sheet supplement which was in effect during the period in which the traffic moved. The Court of Appeals is divided in its interpretation of the item—the crux of this case in so far as the merits are concerned—and, because

of its importance a question based thereon should not be waived by petitioners through failure to present, but should be saved for review and consideration by this court in the event the writ is granted.

Respondent's statement of the case is not as complete as it should be for brief purposes, and leaves some erroneous impressions.

The extensive hearings before the Interstate Commerce Commission and the reports and order issued by it as referred to on page 2 of Respondent's Brief have nothing whatsoever to do with this case. Petitioner, Missouri-Illinois, was not even a party to that case, and the points on its line were not within the scope of the order issued by the Commission in the case referred to. Approximately thirteen years after the division sheet (SWLs' D/S 100) was published following the decision by the Commission referred to, the Missouri-Illinois was invited by the parties to that division sheet, including the Missouri Pacific and Frisco, to become a party thereto (R. 84, 142, 143). In accepting that invitation and voluntarily becoming a party to the division sheet several supplements thereto were issued giving effect to Missouri-Illinois participation therein. Those supplements are 46, 47, 48. By those supplements, Flinton and Kellogg, Illinois, were added as division gateways and agreed division percentages to and from Kellogg were made applicable to and from Flinton (Item 66) (R. 143-147). It is the meaning of the written agreement—the division sheet—which governs and controls. (See Respondent's Brief p. 16).

The traffic in question moved from Greig, Oklahoma, a point in the Southwest, to Selmaville, Illinois, a point on the Missouri-Illinois. The traffic moved as routed over the Frisco, Missouri Pacific and Missouri-Illinois, and moved through two divisional gateways, namely, St. Louis, Mo.-East St. Louis, Illinois, and Flinton, Illinois, and at both of which gateways the traffic was interchanged be-

tween the carriers. It was interchanged by the Frisco with the Missouri Pacific at the St. Louis, Mo.-East St. Louis, Illinois, gateway, and by the Missouri Pacific with the Missouri-Illinois at the Flinton, Illinois, gateway (R. 71, 72, 76, 121).

The Frisco (Respondent) says (page 3 of its Brief) that the Missouri-Illinois in dividing the joint revenue over the Flinton, Illinois, gateway disregarded the divisional factors to and from St. Louis-East St. Louis notwithstanding the fact that all the shipments moved through that gateway, were interchanged thereat, and there passed from Southwestern Territory into Illinois Freight Association Territory.

The truth of the matter is that the Missouri-Illinois did not disregard any of those facts. Those facts might have been controlling if the parties had not agreed to something different on traffic moving between the Southwest and points on the Missouri-Illinois in Illinois. That agreement is embodied in Item 66 of Supplement 46 to SWLs' Division Sheet 100 (Pl's. Ex. 4, R. 31, 33, 34) and the reissue of that item in subsequent supplements, namely, Supplements 48, 52, 53 (Pl.'s Ex. 6, R. 47, 49; Ex. 8, R. 61, 63; Ex. 9, R. 65-69, respectively) and (R. 125-129). Furthermore, there is not one word in the Interstate Commerce Commission reports referred to by Respondent on page 2 of its Brief, and on which Respondent places so much reliance for the establishment of the so-called "Docket 15234 principle" referred to on pages 4 and 5, controlling the determination of the primary breakpoint on traffic interchanged at two of the gateways. The Missouri-Illinois, however, in voluntarily becoming a party to the division sheet protected itself against that very situation by having added as gateways the only two Mississippi River gateways served by it, and by making the same percentage factors applicable by each gateway (R. 76).

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT.

REPLY TO REASON I.

Petitioners are not aware of a single case where the federal courts, in the absence of diversity, have taken jurisdiction of a case involving a dispute between common carriers by railroad over the division of the joint revenue on interstate traffic. The Respondent has cited none. The courts below referred to none.

Division of joint revenue on interstate traffic is either by voluntary agreement of the participating carriers, or by the Interstate Commerce Commission upon complaint made to it by one or more of the carriers asking it to prescribe the divisions. In the instant case the divisions were voluntarily agreed upon by the participating carriers. The petitioners, the Missouri Pacific and Missouri-Illinois, contend that the joint revenue collected on the traffic in question was distributed by the Missouri-Illinois to the participating carriers in accord with the provisions of said voluntary agreement and that their duty under Section 1 (4) of the Interstate Commerce Act [49 U. S. C. A., Section 1 (4)] to establish just, reasonable and equitable divisions of joint rates, fares and charges has been fully complied with.

The Respondent contends that the Missouri-Illinois violated that agreement by breaking the divisions on the Flinton, Illinois gateway, instead of on the St. Louis, Mo.-East St. Louis, Ill., gateway, and therefore violated their duty under Section 1 (4) of the Interstate Commerce Act to maintain said agreed divisions.

Petitioners have never before heard it contended, as Respondent here contends, that the duty to establish divisions embraces the duty to maintain divisions. Petitioners submit that was a forced contention in an effort to

stay within the provisions of Section 1337 of the Judicial Code and the jurisdiction of the federal courts. Respondent contends (pp. 7-9) as alleged (R. 17) that its cause of action arose under the Interstate Commerce Act, 49 U. S. C. A., Section 1 et seq., and jurisdiction is conferred by that Act. If Respondent had any complaint with respect to the reasonableness of divisions it should have complained to the Interstate Commerce Commission. The prescription of divisions is a legislative and not a judicial function. **Baltimore & O. R. Co. v. United States** (1936), 298 U. S. 349, 356; **Terminal R. R. Ass'n. v. United States** (1924), 266 U. S. 17, 30, 31; **Thompson v. Baltimore & O. R. Co.** (C. A. 8, 1946), 155 F. 2d 767, 771. If a divisional agreement has been violated, the complaining party can sue at law to enforce that agreement as was so forcefully stated by this court in **Alton R. Co. v. United States** (1932), 287 U. S. 229, 236, but the court didn't say whether the state or federal courts would have jurisdiction. It is not without significance, however, that in each of the federal cases cited (pp. 10, 11, Respondent's Brief) as supporting its declaration, there was diversity of citizenship.

Cases to no end can be cited where the federal courts have jurisdiction in cases involving undercharges and overcharges on interstate shipments; suits to enforce reparation awards by the Interstate Commerce Commission; a suit to enforce an order by the Interstate Commerce Commission **prescribing** divisions; a suit complaining of the refusal of carriers to receive and transport freight tendered for shipment, or of the refusal of carriers to furnish cars for loading, but there is no single case we are aware of where the federal courts, in the absence of diversity of citizenship, and there is no diversity here (R. 1-2), had jurisdiction of a dispute between common carriers by railroad over the division of joint revenue on interstate traffic.

Petitioners submit that a division sheet is a contract, the interpretation of which does not present a federal question, and in the absence of diversity the federal courts do not have jurisdiction.

REPLY TO REASON II.

Respondent contends that its cause of action arose under the Interstate Commerce Act (49 U. S. C. A., Section 1 et seq.) (R. 17), and jurisdiction is conferred by that Act, but the limitation provisions of Section 16 (3) (a) and (e) do not apply. This contention is made notwithstanding the fact that this court in **Midstate Horticultural Co. v. Pennsylvania R. Co.** (1943), 320 U. S. 356, 361, held that Section 16 is an integral part of the Interstate Commerce Act and the comprehensive scheme of regulation it imposes. It also held in that case (l. c. 357-360) that the expiration of the time limit fixed by Section 16 (3) (a) of the Act for the bringing of actions by carriers for the recovery of their charges **does not merely bar the remedy but extinguishes the right.** The limitation goes to the Commission's and Courts' jurisdiction, so that they have no power to act when the time has expired. **Phillips v. Grand Trunk Ry.** (1915), 236 U. S. 662, 667; **Kansas City Southern Ry. Co. v. Wolf** (1923), 261 U. S. 133, 139; **Midstate Horticultural Co. v. Pennsylvania R. Co.** (1943), 320 U. S. 356, 364.

Respondent cites no cases to support its contention, but it does go into some detail in an effort to avoid the application of the **Midstate Horticultural Co.** principle by arguing that divisions are not charges. Respondent even goes so far as to say that Circuit Judge Johnsen, who expressed disagreement with the majority in their construction of 49 U. S. C. A., Section 16 (3) (a), but who, for the sake of unanimity, went along with the majority, overlooked "the facts that the transportation was completed and the charges therefor paid by the shipper before this dispute arose, and that no party to the dispute performed any com-

mon carrier service for any other party to this action" (p. 13, Respondent's Brief). Again, on page 12, Respondent says:

> "The amount of money sought by Frisco in this suit is not due it by reason of any service performed by it for the Missouri-Illinois, **but is a portion of the sum collected from the shipper**" (Emphasis supplied.)

Apparently Circuit Judge Johnsen did not overlook a thing. He says (p. 14, C. of App. decision):

> "I can see no reason on the statute to believe that, when Congress deemed it advisable, in the interest of uniformity and certainty, to impose a limitation on 'All actions at law by carriers . . . for recovery of their charges, or any part thereof,' it was in any way concerned about or intending to have regard for any theories, forms, technicalities and distinctions in common law actions or recoveries. I think it was fixing a time, as a general transportation-code policy, within which a carrier had to act to recover its transportation charges or revenues against anyone who owed it the duty of making payment thereof as such. And certainly what is here being recovered is in fact transportation charges or revenues."

To the same effect is the decision in **Mobile & O. R. Co. v. Washington & C. Ry. Co.** (D. C., S. D. Ala., 1917), 242 Fed. 531, 535, wherein it is stated:

> "The language is broad, and does not limit the receipt for carriage of the freight to the receipt from the shipper. The language embraces all payments of freight by any person, and includes in its terms, it seems to me, the various carriers over whose lines a shipment may pass, as well as the shipper and the carrier to whom payment is made by such shipper. I can see no reason to limit this language to transactions between the shipper and the carrier, when

the language has not been so limited by the act. Certainly the language is broad enough to embrace payment by one carrier to another over whose lines the freight moves. If the act is, by its terms, made a part of every contract of affreightment between the shipper and carrier, then it seems to me it is also made a part of every contract between the various carriers over whose lines the freight moves.

The act on its face shows all through it that its purpose was not merely to regulate the contracts between shipper and carrier, but, as its title imports, was to 'regulate commerce,' and it regulates this commerce as between all the parties to a shipment of freight over whose lines such shipment passes."

"A charge is the price fixed or demanded for services rendered." (p. 12, Respondent's Brief). The revenue divided by the Missouri-Illinois and the additional revenue demanded of it by the Frisco was the joint revenue collected for the performance of a joint service to the shipper. The Frisco contends that it has not yet received its full portion of the charge paid by the shipper. It has sued to collect that charge.

There seems to be no escape from the application of Section 16 (3) (a) whether emphasis is placed upon **"All** actions at law" or, as contended by Respondent, upon the controlling word "charges" (p. 15, Respondent's Brief).

Petitioners thereof submit that if Respondent's cause of action arises under the Interstate Commerce Act (49 U. S. C. A., Section 1, et seq.), Section 16 (3) (a), which is an integral part thereof, applies, and Respondent's right is extinguished.

The shipments moved during the period June 1, 1944 and October 31, 1945. Respondent filed suit on January 29, 1952 (R. 1, 2).

REPLY TO REASON III.

The Court of Appeals was divided in its opinion with respect to the merit of the case. Judge Sanborn wrote a dissenting opinion (C. A. Opinion, p. 15) in which he states:

> ". . . the record shows that the Missouri-Illinois Railroad Company became a party to the Division Sheet in suit upon the understanding, adequately expressed, that revenues derived from traffic from the Southwest destined for points on its line and received at either Kellogg or Flinton should be divided 22% to it and 78% to the carrier or carriers which transported the shipments to either of those gateways."

Petitioners' disagreement with the majority opinion of the Court of Appeals on the merits may not constitute adequate grounds in and of itself for a writ, but petitioners certainly do not wish to waive any right to a review on the merits if the court should grant the writ on the jurisdictional questions presented.

Finally, we call the court's attention to the Respondent's admission (p. 16) that:

> **"The Courts below were called upon to decide the meaning of a written agreement."**

CONCLUSION.

The questions presented are important for several reasons:

(1) Two of the questions presented are jurisdictional questions, which questions are always important;

(2) The jurisdictional questions presented have never been expressly decided by this court, and should be; and,

(3) Since the jurisdictional questions involved arise out of a dispute between common riers by railroad over the division of joint revenue on interstate traffic, the questions are of vital interest to the railroad industry as a whole because there are now pending before the Interstate Commerce Commission more division cases than were ever before that body at one time.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 2, 1955.